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No. 07-132

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In The

Supreme Court of the United States

2025 EMERY HIGHWAY, LLC,

Petitioner,

v.

BIBB COUNTY, GEORGIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a Georgia sheriff's particular area of law enforcement activity concerns enforcing his county's ordinances (in this case, ordinances regulating alcoholic beverages and adult entertainment), is he acting as an "arm of the state" and thus entitled to Eleventh Amendment immunity?

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STATEMENT OF THE CASE

Petitioner filed his action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Middle District of Georgia. [Doc. 1] In that complaint Petitioner claims that his constitutional rights had been violated by the Defendants, Bibb County, Georgia, Sheriff Jerry M. Modena, Sr., in his official capacity as Sheriff of Bibb County, and John Doe, in his official capacity with the Bibb County Sheriff's Office. The complaint, as amended, contained a multitude of allegations challenging the conduct of the named Defendants in the enforcement of county ordinances regulating the sale of alcoholic beverages and provision of adult entertainment as well as laws of the State of Georgia prohibiting "public indecency" and "masturbation for hire".[1]

Two ordinances of Bibb County, Georgia and two laws of the State of Georgia govern the conduct of the parties in this case. Bibb County enacted two ordinances, one regulating the sale of alcoholic beverages and the other regulating establishments providing adult entertainment to its patrons. [Doc. 104 at ¶ 7-20, 23-25.] Pertinent provisions of these ordinances prohibited establishments licensed to sell alcoholic beverages from providing adult entertainment on the premises as that term was defined in the ordinances;

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[1] Although the Sheriff of Bibb County is not specifically named in his individual capacity as a defendant, language in the body of the complaint suggests that petitioner was attempting to make the Sheriff individually a defendant.

however, establishments desiring to offer adult entertainment could be licensed to do so but were prohibited from serving alcoholic beverages. *Id.* Regardless of how licensed, no establishment could offer or allow conduct specifically proscribed by the ordinances that included conduct described as "engaging in specified sexual activity" or conduct involving the display of "specified anatomical areas". [Doc. 104 at ¶ 15, 17-20, 25.] Both these terms were specifically defined in the ordinances. (Official Code of Bibb County, Georgia, §§ 3-71 9(a, b), 10 (a-e). Two laws of the State of Georgia are also pertinent to the issues in this case. The first is a law making it a crime to commit the offense of "public indecency." [*see,* O.C.G.A. § 16-6-8.] The second statute prohibits "masturbation for hire." [*see,* O.C.G.A § 16-6-16.]

As was found by the District Court in its opinion, Petitioner, at its establishment located in Bibb County, Georgia, allowed and promoted conduct that violated both the ordinances of Bibb County and the criminal laws of the State of Georgia. [Doc. 197] Petitioner opened its establishment, Club Exotica, October 24, 2001. Thereafter, over a two (2) year period investigations of the establishment by the Bibb County Sheriff's Office occurred. Initially, the Sheriff of Bibb County assisted the County in connection with an investigation involving specific conduct occurring in Petitioner's establishment. While engaged in this investigation, the Sheriff's Office also detected and determined that conduct at the establishment also violated the two statutes of the State of

Georgia prohibiting public indecency and masturbation for hire. Based on specific evidence gathered, the Sheriff conducted a raid on Petitioner's premises for the purpose of arresting and charging entertainers and customers violating state law. Arrests for violation of these two statutes were made. No citations or charges were made concerning violation of county ordinances.

Following extensive discovery, both Petitioner and Respondents filed motions for summary judgment. [Doc. 103; Doc. 112.] United States District Court for the Middle District of Georgia granted Respondents' motions disposing of all claims of Petitioner except the claim for violation of Petitioner's Fourth Amendment rights. The District Court held that neither party had clearly addressed necessary issues so that a ruling could be made on the Fourth Amendment claim. *2025 Emery Hwy. v. Bibb County, Georgia, et al.*, 377 F. Supp. 2d 1310 (M.D. Ga. 2005). The effect of this ruling was to dispose of all substantive challenges to the ordinances of Bibb County and the conduct of the Defendants save and except for an allegation that Respondents, in conducting the raid on Petitioner's premises had conducted an illegal search. *Id.* Respondents filed a subsequent motion for summary judgment asserting Eleventh Amendment immunity and qualified immunity as a defense to Petitioner's Fourth Amendment claims. [Doc. 203; Doc. 205] In a second opinion the District Court held that Eleventh Amendment immunity applied and that Sheriff Jerry M. Modena, Sr., in his individual

capacity was entitled to qualified immunity. [Doc. 214] The District Court specifically held that at the time of the raid and the arrests, the Bibb County Sheriff's office and its deputies were enforcing the laws of the State of Georgia and not the ordinances of Bibb County, Georgia. *Id.*

Petitioner appealed the District Court decision to the United States Court of Appeals, Eleventh Circuit. [Doc. 216] That Court summarily rejected Petitioner's appeal affirming, per curiam, the opinion of the District Court. [Doc. 237]

SUMMARY OF ARGUMENT

Petitioner's argument is difficult to summarize and strays from the parameters of the question presented. This is nothing new as the District Court observed in its rulings, "Thus, until now, the Court's attempts to reach any resolution of the shifting theories and morphing claims raised by Club Exotica have been no more successful than an attempt to herd cats." [Doc. 197, p. 1]

After protracted litigation instituted by Petitioner seeking declaratory and injunctive relief, through two lawsuits and an appeal to the District Court, Eleventh Circuit, Petitioner now approaches the Supreme Court in an attempt to defeat the prior rulings that it cannot serve alcohol in a strip club in contravention of the applicable ordinances. To that end, Petitioner seeks to circumvent established case

law on the very question presented by arguing that the Bibb County Sheriff was acting as an arm of the county when he raided the strip club and arrested employees for violation of the State of Georgia's statutes against "public indecency" and "masturbation for hire." *Id.*

The gist of Petitioner's arguments to this Court is that because the Sheriff first became aware of the violations of state law while performing an investigation at the request of the county in relation to a liquor license, the Sheriff was an arm of the county even when he later conducted a raid of the premises and arrested employees and patrons.

Respondents maintain that review of this issue is unnecessary because this very question has been asked and answered, not only by the Eleventh Circuit, but also by this Court. The findings of the District Court in this case were based soundly on precedent including the decisions in *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 117 S.Ct. 1724, 138 L.Ed.2d 1 (1997) and *Manders v. Lee*, 338 F.3d 1328 (11th Cir. 2003). The Eleventh Circuit Court of Appeals affirmed in a half-page decision. [Doc. 237]

Review should be denied because there is nothing to warrant disturbing the sound and settled authority regarding the question of whether the Sheriff in this case acted as an arm of the county or as an arm of the state when he raided Petitioner's establishment and made arrests for violations of state law.

REASONS FOR DENYING REVIEW

I. PETITIONER'S QUESTION PRESENTED HAS BEEN ASKED AND ANSWERED

The District Court in this case definitively answered this very question in the negative. It is well-settled that a sheriff enforcing county ordinances is not acting as an arm of the state and is not, in that role, entitled to Eleventh Amendment immunity. *See, Manders v. Lee*, 338 F.3d 1328 (11th Cir. 2003). *See also, Grech v. Clayton County*, 335 F.3d 1307 (11th Cir. 2003). If a sheriff's conduct "may be more appropriately described as acting as an 'arm of the county,' he is not entitled to sovereign immunity." *Abusaid v. Hillsborough County Bd of County Comm'rs*, 405 F.3d 1298, 1303 (11th Cir. 2005); *See also, Powell v. Barrett*, 378 F. Supp. 2d 1340 (N.D. Ga. 2005).

U.S. Supreme Court Rule 14(1)(a) specifies that, "The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. **Only the question set out in the petition, or fairly included therein, will be considered by the court.** (Sup. Ct. R. 14(1)(a), emphasis added).

Here, Petitioner has asked the court a narrow question, that of whether a sheriff enforcing county ordinances acts as an arm of the state for purposes of claiming Eleventh Amendment immunity. The Court may infer the inverse of the question to be "fairly included;" When a sheriff enforces state law, is he acting as an arm of the state and therefore entitled to Eleventh Amendment immunity? However, this

question is equally pointless. The District Court, using the same analysis, has already answered this question in the affirmative.

This Court has previously considered these questions and made its ruling in *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997). In *McMillian*, the Sheriff of Monroe County, Alabama and other officials were sued pursuant to 42 U.S.C. 1983. The Petitioner in that case principally alleged that Sheriff Tate and Monroe County District Attorney Ikner, in their capacity as officials of Monroe County, and not as officers of the State of Alabama, intimidated a witness into making false statements and suppressed exculpatory evidence. *Id.* at 784. The court noted that the parties agreed that the Sheriff had final policy making authority in the area of law enforcement, but disagreed about whether Alabama Sheriffs are policy makers for the state or for the county when they act in a law enforcement capacity. *Id.* at 785. This Court held, "Alabama sheriffs, when executing their law enforcement duties, represent the state of Alabama, not their counties." *Id.* at 783.

There is nothing in the Petitioner's question presented to warrant consideration by the Supreme Court. "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Therefore, the petition should be denied.

II. THERE IS NO REASON TO DISTURB THE DISTRICT COURT'S FACTUAL FINDINGS

Even giving Petitioner the broadest interpretation of the question and inferring that an "underlying question" might be whether, under the facts alleged, the sheriff was acting as an arm of the state or the county, review should be denied. This factual question was extensively litigated and specifically answered by the District Court in a thorough and well-reasoned opinion, finding:

> In this circuit it is "well-settled that Eleventh Amendment immunity bars suits brought in federal court . . . when an 'arm of the State' is sued." *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003). "Whether a defendant is an 'arm of the state' must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *Id.* There are four factors that courts must consider in determining whether an entity acts as an arm of the state in performing some particular function:
>
> (1) how the state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity. *Id.* at 1309.

[Doc. 214, pp. 3, 4]

The District Court then undertook a comprehensive analysis of the facts under the *Manders* factors, finding:

> In *Manders*, the Eleventh Circuit considered in great detail the legal status of a county sheriff's office in the state of Georgia. Considering each of the four factors in sequence, the court concluded that a Georgia sheriff's office is an independent constitutional office created under the state constitution, over which the state legislature exercises exclusive authority. County commissioners have no authority to dictate policy or direct the actions of a sheriff. Although each county bears "the major burden of funding" for the county sheriff's office, state law mandates minimum salaries for the sheriff and requires the county to "provide reasonably sufficient funds to allow the sheriff to discharge his legal duties." Id. at 1323 (quoting *Chaffin v. Calhoun*, 415 S.E.2d 906, 908 (Ga. 1992). The "'county commission may not dictate to the sheriff how that budget will be spent in the exercise of his duties.'" Id. (quoting Chaffin, at 907). In addition, the court in *Manders* noted that "Georgia courts speak with unanimity in concluding that a defendant county cannot be held liable for the tortuous actions or misconduct of the sheriff or his deputies and is not required to pay the resulting judgments." *Id.* at 1326. The analysis of these four factors is in all respects the same in the present case as in *Manders*.

If this case is to be distinguished from *Manders*, it is only to make more clear that the sheriff's office was acting as an arm of the state. *Manders* concerned a claim of excessive force by an inmate in the county jail. Maintaining custody of inmates in a county jail is the third of the three primary duties that state law delegates to sheriffs. Law enforcement is the first. *Id.* at 1312. Under Georgia law, law enforcement is a duty delegated by the state alone:

> sheriffs in Georgia derive their power and duties from the State, are controlled by the State, and counties cannot, and do not, delegate any law enforcement power or duties to sheriffs. In Georgia, this historical role of the sheriff thus continues to this day as the sheriff directly represents the sovereignty of the State, has no superior in his county, and performs state functions for the sovereign in enforcing the laws and keeping the peace. Id. at 1313. A sheriff's power to make arrests for violations of state law is central to his role as an arm of the state. Thus, the conclusion of *Manders* with regard to a use-of-force policy in a county jail applies equally to the exercise of the sheriff's law enforcement powers in this case. Eleventh Amendment immunity protects the Bibb County Sheriff's Office from suit in federal court for its actions in carrying out arrests for violations of state law.

Id. at 4, 5.

III. NO CONFLICT OF OPINIONS OR DEPARTURE FROM PROCEDURE EXISTS TO JUSTIFY REVIEW OF THE ISSUES PRESENTED

Supreme Court Rule 10 provides examples to "indicate the character of the reasons the Court considers" in making a determination whether to grant a writ of certiorari. SC Rule 10. Although the court is not limited by these examples, they do give an idea of the types of questions the Court will consider. The examples include conflicts between two U.S. courts of appeals, conflicts between a U.S. court of appeals and a state court of last resort on an "important federal question," or a drastic departure from "the accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a). The examples also cover conflicts between state courts of last resort and decisions of a state court of a U.S. court of appeals that require settlement by the Supreme Court or are in conflict with the Supreme Court. Sup. Ct. R. 10(b) & (c).

Here, Petitioner has not asserted any such scenario. In this case, the decision of the lower court is in complete agreement with the Supreme Court's holdings. In fact, in citing and discussing *McMillian*, as well as *Manders*, Petitioner relies chiefly on dissenting opinions. Petitioner's reliance on *McMillian* is misplaced. The *McMillian* decision clearly answers the question posed here by Petitioner in the role of a Georgia sheriff enforcing state criminal laws. Petitioner's attempt to circumvent the clear lesson to be derived from the *Manders* decision fails in its purpose.

McMillian and *Manders* both make it clear that a sheriff enforcing state law is entitled to Eleventh Amendment immunity. Petitioner attempts to avoid this rule by a rambling factual discourse, the purpose of which is to suggest that factually the District Court was incorrect when it determined that the sheriff was enforcing state law and not county ordinances. The District Court opinion contained clearly articulated factual findings and conclusions of law that are not directly challenged in the Petition. Rather, Petitioner sets out, in its rambling fashion, highly selected and incomplete facts that are in part inaccurately stated.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* (Sup. Ct. R. 10). Accordingly, even if this Court gives credence to Petitioner's arguments that the District Court erred in finding that the Defendant was indeed acting as an arm of the state, certiorari should be denied.

IV. AN ANALYSIS OF THE FACTUAL SITUATION REVEALS THAT THE SHERIFF ACTED IN TWO SEPARATE CAPACITIES REGARDING PETITIONER'S ESTABLISHMENT AND THE ACTIVITIES CONDUCTED THERE

In the interest of thoroughness, Respondent will briefly address the relevant factual situation of whether the sheriff in this matter was enforcing state law or county ordinance at the time of the raid.

Petitioner relies on the fact that the sheriff's involvement with Club Exotica initially began with a routine request by the Bibb County Board of Commissioners for an investigation of Petitioner's application for a liquor license. This investigation resulted in the sheriff recommending disapproval of the application. It is noteworthy that the sheriff did not have the power or authority to approve or disapprove the application, but merely made the recommendation based on his investigation. The final authority rested with the Board, which duly held a hearing on the matter and then denied the license.

Petitioner filed suit and the license was eventually granted on the basis of a settlement agreement between Petitioner and the Board that Club Exotica would not allow nude dancing, which was prohibited under the county's liquor ordinances in licensed establishments. The county ordinances did not prohibit nude dancing altogether, just in establishments licensed to serve alcohol. Therefore, Petitioner had the choice to either allow nude dancing or serve alcohol. Petitioner chose to serve alcohol and was granted a license to do so.

Soon after opening Club Exotica, Petitioner began featuring nude dancing, claiming it was operating under a "mainstream exception" contained in the county's Alcohol Code § 3-71(c)(4). Although the county took no immediate action against Petitioner's liquor license, Petitioner filed a second lawsuit seeking protection from the county doing so. "Anticipating the County's argument that its adult licensing and

zoning codes (together 'the Adult Code') prohibit nude dancing in establishments licensed to serve alcoholic beverages, the club challenged the validity of enforcing the Adult Code against it." (Petition, p. 8) The district court, after hearing oral arguments on Petitioner's motion for declaratory and injunctive relief, denied the motion, finding Petitioner's fear of potential "criminal sanctions" was "unfounded" based on representations by Petitioner that it was a "mainstream performance house" and on assurances by the county that if this was so, no action would be taken against Club Exotica. *Id.* at 11, 12.

As stated in the Petition, the county:

> explained that in the event Club Exotica attempted [to operate a mainstream performance house], the County would conduct its own investigation as to whether the requirements of the exception were being met. If, after this investigation, the County concluded that Club Exotica was operating in violation of the Alcoholic Beverage Code, it would provide Club Exotica with reasonable notification that its alcoholic beverage license may be revoked. At that time, a license revocation hearing "meeting all due process requirements," would be promptly scheduled and held. *Id.* at 12, [Doc. 65]

Again, the county requested the sheriff to undertake an investigation to determine whether Petitioner was meeting the requirements of the mainstream performance house exception. The investigation

revealed that it was not and the sheriff recommended revocation of the current license and denial of a Petitioner's application for a liquor license for the upcoming calendar year.

Accordingly, the county notified Petitioner of a hearing on the matter and invited Petitioner to submit input regarding the selection of a hearing officer. However, Petitioner failed to submit any input and failed to show up at the scheduled hearing, choosing instead to fax a letter the following day "expressing concerns about the nature and justification of the hearing," and threatening "to sue the Sheriff, the BCSO and the County for malfeasance in enforcing state and local laws, and objected to their adverse licensing decisions which it believed were in direct retaliation for exercising its First Amendment rights." (Petition, p. 13) Nonetheless, the Board did not elect to simply revoke Petitioner's license, but instead rescheduled the hearing at a future date to accommodate Petitioner.

Meanwhile, not only had the sheriff received outside information that the employees of Club Exotica were violating statutes of the State of Georgia, but the sheriff's deputies investigating the club's activities had personally observed such conduct. Specifically, deputies related seeing female performers giving "lap dances" that involved sitting on a patron's lap and moving around in a sexual nature while exposing their breasts and vagina, and allowing patrons to touch their breasts and vaginas with hands and mouths. The deputies also observed the

female dancers performing simulated sex acts on-stage and allowing male patrons to perform oral sex on them. Among other such activities, deputies reported seeing patrons using their hands or mouths to place paper money in an entertainer's vagina, nude entertainers manipulating their vaginas to create movement and noise, nude entertainers "walking" across the stage on their buttocks and placing their vaginas in close proximity to patrons' faces, patrons inserting finger(s) into an entertainer's vagina, and dancers performing masturbatory acts on patrons and receiving money specifically for those acts. [Doc. 104, pp. 12, 13] Informants also related observing this conduct and so testified. [Doc. 104, Exh. D-12] All these acts and many more were in direct violation of Georgia statutes.

Given this plethora of information and observations, it is irrelevant why the sheriff's deputies initially began the investigation. Clearly, regardless of why the deputies were investigating the nature of the performances at Club Exotica, it was obvious that state statutes regarding simulated sex acts, sodomy, and masturbation for hire were being routinely committed. As the entity charged with enforcement of Georgia law, the sheriff had no choice but to proceed with a criminal investigation, establish probable cause that crimes were being committed, and then arrest the perpetrators of such criminal activity.

Therefore, even though the sheriff's office initially began the investigation of Club Exotica to determine whether its operation met the requirements of the

county's adult code, it is axiomatic that the investigation revealed criminal activity. Once criminal activity was discovered, it became the duty of the sheriff's office to conduct a separate, more intensely focused investigation into the nature and scope of the criminal activity. During this phase of investigation, the sheriff's office determined that the criminal activity was pervasive and took steps to identify and arrest the perpetrators. This climaxed in the raid conducted on the night of August 16, 2003.

V. PETITIONER MISSTATES BOTH THE FACTS OF THE CASE AND THE APPLICATION OF THE LAW TO THOSE FACTS

Supreme Court Rule 15, which governs the contents of a Brief in Opposition to a Petition for a Writ of Certiorari, requires the opposition to

> address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition.

Sup. Ct. R. 15. It is thus necessary and prudent to address several misstatements found in the Petition at this time.

A. Petitioner disputes whether the Sheriff was "invited" to raid Club Exotica.

Petitioner notes that a letter was written on August 15, 2007 but disputes whether the language could be interpreted as inviting a raid on the premises. Petition, p. 13. n. 7. In fact, the letter, written by Petitioner's attorney, criticized the Sheriff for *failing* to make arrests, stating, in pertinent part:

> [t]he Sheriff has apparently allowed criminal acts (*i.e.*, prostitution and "many other lewd and indecent acts") to occur in Club Exotica since 2001. Why the Sheriff did not arrest the offending parties is not clear. The Sheriff's Office appears to have breached its duties by observing crime inside Club Exotica but failing to protect patrons and employees by stopping it. In our professional judgment, if Club Exotica suffers from any injury which flows from the Sheriff's malfeasance (or nonfeasance), that injury will give rise to a host of substantive due process, equal protection, and free speech claims against the Sheriff, his Office, and the County. [Doc. 67, Ex. B]

In addition, Plaintiff's Counsel "told the District Court that if an officer 'saw the crime being committed, [he/she could] arrest the perpetrator.'" Brief of Defendants-Appellees, No. 06-12268-II, November 15, 2006, p. 8, citing Doc. 204, ¶25. The Club's owner, John Cornetta, "stated in a television interview that if State Law violations are being committed inside Club Exotica, Defendants should come and arrest the

perpetrators and he would assist in any way he could." *Id.* at ¶28.

Although neither the Club's attorney nor the Club's owner may have envisioned a "raid" on the premises, both of them clearly invited, and even challenged, the Sheriff to enter the premises and arrest the perpetrators of the observed crimes. In point of fact, the Club's attorney went so far as to threaten legal action against the Sheriff's Office if such entry and arrests were not made.

B. Petitioner alleges that arrests were made for nude dancing in violation of the county's alcohol ordinances and that the raid was planned for that purpose.

Petitioner states to this Court, "After all, the Sheriff did not arrest the female performers for fraud or assault, he arrested them for dancing (in what he believed to be) insufficient clothing and in an inappropriate manner." Petition, p. 27. In like manner, Petitioner states,

> the question should be whether a Georgia sheriff was the final policymaker for the State or the county when he or she acted in the particular issue in that case (i.e. meeting with the County's attorney to monitor and raid a strip club for violating a settlement agreement or violating county ordinances).

Petitioner goes on to add, "Investigating a murder is a far cry from investigating whether a nightclub is honoring a county settlement agreement to refrain from offering adult entertainment at its location." *Id.* at 28.

In each instance, Petitioner mischaracterizes the nature and thrust of the Sheriff's investigation. Although the Sheriff did undertake to investigate whether or not the establishment was in compliance with county ordinances, that phase of the investigation ended with the Sheriff's conclusion that it was not and his recommendation to the Board that the current license be revoked and the new application denied. No raid was necessary for that. Petitioner admits as much by calling Club Exotica a "strip club." *Id.*

Petitioner, in stating that, "The fruits of this raid (and the predicate synopsis for the raid) would serve as the bases for revoking Club Exotica's alcohol license," misses the point. The Sheriff's recommendation for revocation of the license was made on or about July 17, 2003 by letter citing the violations of Georgia statutes as well as the county's Alcohol Code. *Id.* at 12. The raid did not take place until August 16, a full month after that recommendation was made. The purpose of the raid was to make the arrests of the perpetrators of the criminal violations.

A raid to make arrests was not needed to revoke the liquor license of Club Exotica. As Petitioner points out,

> Though the Sheriff typically reviews over 100 alcohol license applications each year [Doc. 26 at 15-16], the County has revoked only two or three alcohol licenses since 1993 [Doc. 149 at 55-56; Doc. 163 at 7-8]. Those clubs, Like Club Exotica, offered nude dancing, including one with 'girls down . . . from Atlanta dancing nude.' *Id.* at 56. As far as raids go, the Sheriff cannot recall when the BCSO last raided an alcohol-licensed establishment, but it has raided strip clubs before [Doc. 147 at 44-45]

Thus, Petitioner's argument tends to support that the Sheriff would have no need to raid an alcohol-licensed establishment in order to revoke its license for allowing nude dancing but that "strip clubs" had been raided. What Petitioner fails to mention is the reason for the raids on the strip clubs. Since the county allows the existence of strip clubs featuring nude dancing, (even though it denies liquor licenses to such establishments), a raid of a strip club without a liquor license would only be predicated on violations of state law.

C. Club South Beach, the example given by Petitioner as similarly situated, has not been treated differently or given deferential treatment.

Petitioner states, "While the BCSO was investigating Club Exotica, the business in town most similarly situated to it [Doc. 162 at 93; Doc. 149 at 25-26; Doc. 166 at 36; Doc. 167 at 47], a nightclub known

as South Beach, was experiencing problems with drugs, beatings, rapes, stabbings, underage sales, and racial discrimination" [*see* Doc. 148 at 27; Doc. 162 at 86-90, Doc. 163 at 9-10; Doc. 164 at 21; Doc. 166 at 29, 33-34, 70-71; Doc. 167 at 50] Petitioner fails to state that South Beach is not a strip club and does not feature nude dancing. Whatever else might go on at South Beach is not at issue in this matter. Nonetheless, the documents cited by Petitioner tend to support that the Sheriff actively investigated Club South Beach (formerly Rock-A-Billy's) in a similar manner to the investigation of Club Exotica. *See for example,* Doc. 162 at 87 (procedure of investigating Rock-A-Billy's similar or essentially identical to the procedure for surveiling Club Exotica). In fact, in direct contradiction to Petitioner's accusation that the Sheriff's Office is showing favoritism to South Beach, each deponent identified arrests, ongoing problems, and more than one raid on the premises. *See,* Doc. 162 at p. 90.

D. Although the Sheriff's Office performs county functions as well as enforcing State law, these activities are separate.

In continually asserting that the Sheriff makes recommendations regarding issuance or revocation of liquor licenses and that the Sheriff conducts investigations into the operations of establishments holding liquor licenses, the Petitioner erroneously concludes that the results of any such investigations will necessarily conclude only in county action. While it is true

that the activities of Club Exotica were initially investigated by the Sheriff's Office at the request of the county's Board regarding issues related to the county's alcohol ordinances, the investigation itself uncovered state law violations beyond the acts necessary to cause the Sheriff to recommend revocation of a liquor license.

Once the Sheriff's Office, whether in the course of a county-requested investigation or in the course of an investigation based on outside information regarding criminal activity, actually observed such criminal activity, the Sheriff was required to undertake such investigative tactics as necessary to secure arrests of the criminal actors. Although Petitioner argues repeatedly that the actions of the Sheriff can only be as an arm of the county *or* as an arm of the state, it is clear that at any given time, the Sheriff could be performing either role.

Here, although the Sheriff originally undertook to investigate Club Exotica at the request of the county in relation to county alcohol ordinance compliance (in which case he would have been an arm of the county), this cannot act to prevent the Sheriff from carrying out his primary duty, which is enforcement of state laws (in which case he would become an arm of the state). In this case, the Sheriff was acting as an arm of the county when he began the investigation at the county's request to determine compliance with the county's alcohol regulations. However, once the Sheriff determined that state laws were being violated (regardless of whether or not these actions violated the county alcohol code), his role shifted to

that of an enforcer of the state's laws and he became an arm of the state.

The Sheriff's role is bifurcated in this regard. This would be true in any case in which the Sheriff operated in more than one capacity. Nonetheless, the Sheriff's roles can be separated and identified as one or the other based on the primary intent of his actions. When the Sheriff makes recommendations to the county regarding compliance with its alcohol ordinances, he is clearly acting for the county. However, when the Sheriff pursues arrest of subjects for violations of state crimes, he is clearly acting for the state.

Petitioner cites § 3-2-31 of the O.C.G.A. as authorizing the sheriff to act as an arm of the county. However, this statute serves to show that even when the sheriff is doing so, he is, under this statute, acting as an arm of the state. O.C.G.A. § 3-2-31 states:

TITLE 3. ALCOHOLIC BEVERAGES
CHAPTER 2. STATE ADMINISTRATION AND ENFORCEMENT
ARTICLE 2. ENFORCEMENT

§ 3-2-31. Assistance by enforcement officers to local authorities in criminal cases

(a) Upon a request by a governing authority of any municipality or county, the sheriff or chief of a county police force, the judge of the superior court of any county, or the Governor, the commissioner, in unusual circumstances, may and, in the case of an order from

> the Governor, shall direct special agents and enforcement officers of the department to render assistance in:
>
> (1) Any criminal case;
>
> (2) The prevention of violations of law; or
>
> (3) Detecting and apprehending those violating any criminal laws of this state, any other state, or the United States.
>
> (b) This Code section shall not apply solely to agents who enforce this title but shall apply to all agents of the department with law enforcement powers.

Under the Georgia statute, although the Sheriff's Office may be acting at the request of a governing authority of a municipality or county, the officers are at all times acting as an arm of the state rendering aid to the requesting entity. That the Sheriff's Office may incidentally make recommendations to the requesting entity regarding the entity's request, does not act to impede the Sheriff's primary duty, which is clearly defined as law enforcement.

CONCLUSION

Neither the question presented nor any question fairly included therein, requires consideration by this Court. The question presented, as well as its inversion, is well-settled in the Eleventh Circuit as well as

other federal venues. An examination of the factual findings of the District Court reveals a well-reasoned and thorough analysis in complete alignment with precedent and with this Court's holdings. The Court of Appeals for the Eleventh Circuit affirmed the District Court's ruling in a per curiam opinion, finding no reversible error.

The bottom line is that there is nothing new presented. Petitioner desires to operate a strip club that serves alcohol. This is not allowed under the provisions of Bibb County's alcohol regulations. Petitioner is attempting to use the courts to effect a result that thwarts the county's ordinances by filing seemingly endless lawsuits and appeals to each decision not to allow it to do so.

For these reasons, Bibb County, Georgia, asks the Court to deny the petition for certiorari.

Respectfully submitted,

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